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In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. 63

UNITED STATES OF AMERICA,
Petitioner,

v.

LOUIS T. MERZ, ET AL.,
Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION

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April, 1963.

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In the

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OCTOBER TERM, 1962

No. 790

UNITED STATES OF AMERICA,
Petitioner,

v.

LOUIS T. MERZ, ET AL.,
Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The District Court did not prepare an opinion. The opinion of the Court of Appeals is reported at 306 F.2d 39.

JURISDICTION

The jurisdictional requisites are adequately stated in the Petition.

QUESTION PRESENTED

Whether the findings and reports of the Commission, appointed under Rule 71A(h) to determine just compensation, were sufficient in detail when they itemized the farm tracts involved, interests taken, the highest and best use

(specifically rejecting claimed special uses), correctly stated the measure of just compensation (the difference in fair cash market value immediately before and after the taking), specifically excluded any consideration of use of the space included in the clearance easements by aircraft or otherwise, and showed that the tracts were personally viewed by the Commission.

STATEMENT

This condemnation litigation commenced March 8, 1956, when the United States filed its complaint to take clearance easements over several farms, and one tract in fee, in Washita County, Oklahoma. The clearance easements were taken in connection with Clinton-Sherman Air Force Base runways, varying from 13 feet to 164 feet in elevation (R. 48-49).

The interests taken granted the Government the perpetual right to top, cut to ground level, remove and prohibit trees, bushes, shrubs or any other growth or undergrowth extending above described planes, and the continuing perpetual right to remove, raze, destroy and prohibit construction of buildings, other structures and embankments, together with the right of ingress and egress to exercise such rights (R. 3-4). A more severe clearance easement as to one tract and a fee simple taking were included in an Amendment To Complaint and Declaration Of Taking No. 2, filed March 4, 1957 (R. 23-32). The District Court ordered the issue of just compensation to be heard by a Commission (R. 37-38).

The single issue raised by the Government's Petition to this Court is the sufficiency of details in the reports of the Commission. All other contentions have been discarded by the Government, including the one additional point presented to the Court of Appeals concerning admissibility of the testimony of Mr. Willcox. Neither in that Court nor here is there any complaint as to the sufficiency of the evidence to support the awards of just compensation or any suggestion that the awards were excessive. It is, therefore, necessary to examine the "Report of Commissioners" and "Additional Report of Commissioners" (R. 38-46, 48-52). The sufficiency of their details is all that remains of this controversy which has been in litigation for over seven years.

The findings and reports described separately all the tracts involved (R. 39-45), stated the clearance easements taken as to each tract-varying from 13 to 164 feet in elevation (R. 38-49), found the ownership of the tracts and the nature of the interests owned in them by the parties (R. 49-50), and found in the Additional Report that the highest and best use of all the land involved is for general agricultural purposes (R. 50).

The reports further stated the measure of compensation awarded for each land owner—"the difference between the fair cash market value of the estate of the defendants at the time of the taking and the fair cash market value of the estate of the defendants immediately after said taking, bein gthe demunition (*sic*) of said fair cash market value caused solely and directly by the taking . . ." (R. 50), and rejected any consideration of use of the area included in the

clearance easements, such as by airplanes or otherwise (R. 51). It was found as to Tract A-142 that the proof was speculative and inadequate to show any value of the land as a sand pit (R. 45-46). The reports stated that the motion to strike all the testimony of Mr. Willcox was overruled,[1] and the motion to strike the testimony of Mr. Davis was sustained (R. 51). It was also reported that the lands in question were viewed by the Commission (R. 39).

The District Court had appointed the Commission on the grounds provided in Rule 71A(h) of the Rules of Civil Procedure. The Government made no request for specific findings, and the Order appointing the Commission required no special findings of facts and conclusions of law (R. 37-38). Objections were filed to the sufficiency of the original report by the Government, not calling, however, for the numerous details now magnified in the Petition (R. 46-47). The "Additional Report of Commissioners" stated findings of fact and conclusions of law (R. 48-52). After this final report, the Government filed more extended objections (R. 52-55). The District Court rejected these contentions as to form, and adopted the reports by its judgment (R. 57-74).

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[1] The motion to strike all the testimony of Mr. Willcox was untenable. He was qualified to state his opinion on diminution in fair cash market value by reason of appraisal experience in the mortgage loan business since 1934 (R. 152-153). His opinion on such diminution in value was competent in any event (R. 153-154; 157-158; 160-163). The Government's only motion was to strike *all* his testimony (R. 275-278). Since at least a substantial part of such evidence was competent, the motion to strike all was properly overruled. *United States* v. *Bechtold Co.*, 129 F.2d 473, 480 (8th Cir., 1942); *Arizona Power Corp.* v. *Smith*, 119 F.2d 888, 891 (9th Cir., 1941); see also *Summit Drilling Corp.* v. *Commissioner*, 160 F.2d 703, 706 (10th Cir., 1947).

The Court of Appeals also considered the objections as to the form of the reports. It sustained the reports as showing the adoption of the proper method of determining just compensation, and stated that the awards were "well within the range of this conflicting testimony." 306 F.2d at 42. It pointed out that the evidence presented to the Commission was properly directed solely to the diminution in value of the lands after the taking, and that there were not numerous elements to consider as to just compensation. It concluded:

> "We are satisfied that, considering the record as a whole, including all the evidence, our power to review the awards can be properly exercised, and that more specific findings would not be helpful. The situation might be different if there were numerous elements to be considered in arriving at just compensation, as there were in the cases from the Fourth and Fifth Circuits which the United States relies upon. The issues in this case are not complicated, however, and the findings are entirely adequate to permit us to review them and conclude that they are not clearly erroneous." 306 F.2d at 42-43.

ARGUMENT

The Petition's casting of the question presented is not warranted by the opinion of the Court of Appeals and this record, we submit.[2] The opinion cannot be viewed as sanc-

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[2] The Petition phrased the question presented as follows:

> "Whether the report of a commission awarding compensation in a condemnation case tried outside of the presence of the court, which does not show what facts were considered or what law was applied, precludes effective court review and therefore deprives the parties of the right to have just compensation judicially determined."

tioning any departure from the requirement of sufficiently comprehensive findings and reports, which it recognizes as follows:

> "'The primary and basic test as to the adequacy of findings is whether they are sufficiently comprehensive and pertinent to the issues in the case so as to provide a basis for purposes of decision.' Shapiro v. Rubens, 7 Cir., 166 F. 2d 659, 665. See United States v. Tampa Bay Garden Apartments, Inc., 5 Cir., 294 F. 2d 598; United States v. Pendergrast, 4 Cir., 241 F. 2d 687; 5 Moore's Fed. Practice Par. 52.06 [1] at 2656 (2d Ed. 1951). The extent of exactness which is required in findings depends upon the nature of the matter involved. Kelley v. Everglades Drainage Dist., 319 U. S. 415, 63 S. Ct. 1141, 87 L. Ed. 1485. The evidence presented to the commission in this case related entirely to the diminution in value of the lands after the easements were taken, and a general finding as to this amount was made." 306 F.2d at 42.

Therefore, only a question of *degree* of details is involved. In these particular circumstances, did the Court of Appeals err in holding—as the District Court held—that their review functions could properly be performed with these reports? There is no error and the decision poses no conflict with opinions of this Court, no such conflict with those of other Circuits as to call for review here, and no question of importance appropriate for settlement by this Court.

1. There is no error and the opinion below is not in conflict with decisions of this Court. The opinion of the Court of Appeals recognizes that the findings must be "sufficiently comprehensive and pertinent to the issues" to form

the basis for the decision. 306 F.2d at 42. It holds only that their specificity is sufficient on this record. These reports described the tracts (R. 39-45), the clearance easements taken (R. 38-49), the interests owned by the parties (R. 49-50), and found the highest and best use of the land as agricultural (R. 50). Improper elements were expressly rejected, such as use by aircraft or otherwise of the area in the easements (R. 51). Inadequate and speculative proof of the value of some of the land as a sand pit was specifically disregarded (R. 45-46). Damages found were confined to diminution of fair cash market caused solely and directly by the taking (R. 50). The basis for the decision was made clear.

On this record, the opinion below cannot fairly be read as endorsing any "lax procedure," as claimed by the Petition. In such circumstances, it was rightly held that the findings were adequate. Morever, the rule expressed in the opinion is correct, properly sustaining the requirement that findings be "sufficiently comprehensive and pertinent to the issues in the case so as to provide a basis for purposes of decision . . ." *Shapiro* v. *Rubens*, 166 F.2d 659, 665 (7th Cir., 1948); *Petterson Lighterage & Towing Corp.* v. *New York Central R. Co.*, 126 F.2d 992, 996 (2d Cir., 1942); *United States* v. *Tampa Bay Garden Apartments, Inc.*, 294 F.2d 598, 606 (5th Cir., 1961).

The extensive itemization now sought is not required in such findings. It is first contended that there is no indication of "what evidence was credited in reaching the result," followed by several similar inquiries relied on (Petition, pp. 7-10). Findings under Rule 52(a), bound by the

same requirement, are not obliged to include "a detailed itemization of the proof relied upon in order to reach the result." *United States* v. *Lewis*, 308 F.2d 453, 460 (9th Cir., 1962). They need not contain "detailed evidentiary findings . . ." *Carr* v. *Yokohama Specie Bank, Limited*, 200 F.2d 251, 255 (9th Cir., 1952); *Elam* v. *United States*, 250 F.2d 582, 583 (6th Cir., 1958), *cert. denied*, 358 U.S. 848 (1958); *Lowe's* v. *Lieberman*, 78 F. Supp. 201, 216 (D. Mass., 1948). The Petition now questions whether the Commission properly disposed of several details, stressed here for the first time. However, findings need not be made "on all the facts presented," *Klimkiewicz* v. *Westminster Deposit & Trust Co.*, 122 F.2d 957, 958 (D.C. Cir., 1941), *cert. denied*, 315 U.S. 805 (1942); nor are they inadequate where they do not discuss all contentions of the parties. *Schilling, et al.* v. *Schwitzer-Cummins Co.*, 142 F.2d 82, 84 (D.C. Cir., 1944). A terse answer to the Petitioner's quarrel with the findings was stated by JUDGE LEARNED HAND:

> "Findings should not be discursive; they should not state the evidence or any of the reasoning upon the evidence; they should be categorical and confined to those propositions of fact which fit upon the relevant propositions of law." *Petterson Lighterage & Towing Corp.* v. *New York Central R. Co.*, 126 F.2d 992, 996 (2d Cir., 1942).

There is no conflict shown with applicable decisions of this Court. *Ohio Bell Tel. Co.* v. *Public Utilities Comm'n*, 301 U.S. 292 (1937), cited at page 7 of the Petition, only held that it was error to base conclusions on unidentified matters not of record, and on matters improperly given

judicial notice. *Carter* v. *Kubler*, 320 U.S. 243 (1943), decided only that a commissioner's unannounced independent investigation could not serve as the basis for his determinations under Bankruptcy Act procedure. In the instant case, there is no argument that matters not of record were considered, and all contentions as to admissibility of evidence have been abandoned.

The Government does maintain that if improper evidence is disregarded, only the landowners' valuations would support the awards. This ignores Mr. Willcox' competent testimony on decrease in fair cash market value (R. 153-154; 157-158; 160-163), and the Commission's view of the property as contemplated by the Order of appointment (R. 37), to which great weight is attached. See *e.g.*, *United States* v. *Wise*, 131 F.2d 851, 853 (4th Cir., 1942); *United States* v. *Certain Lands Located in Orange County*, 57 F. Supp. 96, 98 (S.D.N.Y., 1934); *United States* v. *80.46 Acres in Erie County*, 59 F. Supp. 876, 877 (W.D.N.Y., 1944), *aff'd*, 148 F.2d 714 (2d Cir., 1945). In any event, the awards were below *both* the landowners' valuations and those of Mr. Willcox, which the Commission judged with the advantage of a view of the lands (R. 39).

At pages 8 and 9 of the Petition the Government contends that the reports and findings did not state whether the Commission relied upon a mathematical formula stated by Mr. Willcox, did not state whether the managerial skill of the individuals operating the farms was considered, and did not state whether the Commission considered the testimony concerning offers. The awards themselves show that the mathematical formula was not relied upon, inasmuch

as there is not the relationship between the awards that there would be if the formula had been adopted, relied upon or used.[3] The only proof as to offers was evidence, pertaining solely to one tract, to the effect that *no* offers were received (R. 144-145). There was no proof of any offer as such. The only evidence as to managerial skill was the statement of Mr. Willcox, on cross-examination, that a well operated tract ordinarily sold for more than a poorly operated farm (R. 215-216).

The opinion of the Court of Appeals is not in error nor in conflict with decisions of this Court. The proper test on specificity of findings was applied.

2. There is no such conflict with other Circuits, nor with perplexing adversity in decisions, as to call for review by this Court. While the opinion in *United States* v. *2872 Acres of Land in Clay and Quitman Counties, et al.*, 310 F.2d 775 (5th Cir., 1962), states that it is "at variance" with the opinion below, we submit the Tenth Circuit's decision does not create any "real and embarrassing conflict of opinion and authority" requiring review by this Court.[4] *Layne & Bowler Corp.* v. *Western Well Works, Inc.*, 261 U.S. 387, 393 (1923). The remainder of the decisions relied on by

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[3] For example, compare the testimony of Mr. Willcox concerning the first two tracts, A-104E and A-106E. His opinion was that the latter tract's damage was the larger (R. 154, 157). However, the Commission's award for the latter tract was less than one-third its award for the former (R. 40-41).

[4] A petition for certiorari has been filed in No. 850, this Term, seeking review of the judgment of the Fifth Circuit. On March 21, 1963, a memorandum was filed by the Government joining in the request for review, and claiming conflict between the Fifth Circuit opinion and that of the Tenth Circuit in the instant case.

the Government as conflicting actually harmonize with the Tenth Circuit's views.

The *Clay and Quitman Counties* opinion of the Fifth Circuit does refer to the absence of indication as to which evidence was credited and which was discredited. 310 F.2d at 777. It observes that the commission failed to state whether it was certain proof of sales or opinion evidence that sustained the land values found. 310 F.2d at 779. However, the rationale of the opinion, as expressed below, reveals as much of harmony as of discord and underscores the *ad hoc* nature of the decision:

> "Although admittedly the scope of review, either by the trial court of the commissioners' findings of valuation or by this Court on the trial court's judgment, is restricted in the sense that a reversal is to be had only if the order under review is clearly erroneous, this function cannot be adequately performed by the reviewing court unless the fact finder makes it plain what the basis of its decision was. We do not say that every contested issue raised on the record before the commission must be resolved by a separate finding of fact. We do say, however, that there must be sufficient finding of subsidiary facts so that it will appear to the reviewing court that the ultimate finding of value was soundly and legally based . . ." 310 F.2d at 779.

These opinions of the Fifth and Tenth Circuits present no "real and embarrassing conflict." Their results represent judgments formed on separate records, with permissible differences in evaluation as to details required in the findings.

Examination of the remaining cases from the Second, Third, Fourth, Fifth and Ninth Circuits, cited at page 6 of the Petition, reveals no conflict with the opinion below. These decisions merely record rulings as to findings made on particular facts. Of them it is stated that the "rule" of these Circuits is to require "meaningful reports showing the facts found and the law applied in reaching an award." (Petition, pp. 5-6). What the Tenth Circuit said and did here cannot be read as creating a conflict.[5]

Indeed, reliance on *United States* v. *Lewis*, 308 F.2d 453 (9th Cir., 1962), to establish a conflict seems wholly misplaced. In the first two cases decided by this opinion, findings were held insufficient because the highest and best use of the land was not specified and the consideration given to gravel deposits was ignored. In the second two cases involved in the *Lewis* opinion, the findings covered these points and were sustained—as in the instant case where the highest and best use *was* found and consideration of value as a sand pit *was* excluded. In rejecting the Government's demand for still further details, the Ninth Circuit stated:

> "The objections of the United States in these cases seem to be directed to the fact that the findings and report do not disclose what proof the commission relied on and why the commission chose to believe certain witnesses and accept certain evidence as more credible

[5] Where the issues are simple as in the instant case, the *Cunningham* opinion, relied on in part for the asserted conflict, stated that the decision "could be reviewed as well without findings as with them." *United States* v. *Cunningham*, 246 F.2d 330, 333, n. 1. (4th Cir., 1957).

than other witnesses and other evidence. Findings need need not be so comprehensive. They should, as the United States asserts, show 'how' material factual disputes relating to value have been resolved. But this requirement relates to a showing of the result—the fact as found—and not to a detailed itemization of the proof relied upon in order to reach that result. We conclude that the findings and report in each case are sufficient." 308 F.2d at 460.

3. The Petition does not justify certiorari on the importance of any question involved here. In the opinion below, the Tenth Circuit properly reasoned that the particular facts of each case determine the "exactness of the findings required . . ." *Kelley* v. *Everglades Drainage District*, 319 U.S. 415, 419 (1943). Therefore, it is somewhat difficult to conceive the important and binding precedent that would result from review in the instant case. Our record—on these tracts, these clearance easements, this sand pit, this testimony and view by this Commission—serves as no broad base for a pronouncement from this Court. Since only the application to particular facts of the rule of procedure on findings is involved, a precedent by this Court would not seem to be required or possible. See *Commissioner* v. *Factor*, 364 U.S. 932 (1961), *denying cert.* in *Factor* v. *Commissioner*, 281 F.2d 16 (D.C. Cir., 1960); *Factor* v. *Commissioner*, 364 U.S. 933 (1961), *denying cert.* in *Factor* v. *Commissioner*, 281 F.2d 100 (9th Cir., 1960).

The importance to warrant review of the opinion below is not shown. The Government relies primarily on the volume of condemnation litigation, including that in the Tenth Circuit, to illustrate the significance of the instant

case. However, no special guidance for the courts seems necessary or practicable or possible by a review of the Tenth Circuit's assessment here, on a particular record, as to the itemization called for in findings by this Commission.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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April, 1963.